BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE RIOS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,029,792
ASSOCIATED WHOLESALE GROCERS	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed the November 25, 2008, Award entered by Administrative Law Judge Steven J. Howard. The Workers Compensation Board heard oral argument on March 4, 2009.

APPEARANCES

Conn Felix Sanchez of Kansas City, Kansas, appeared for claimant. Frederick J. Greenbaum of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The parties also stipulated, at oral argument before the Board, that the functional impairment rating provided by Dr. Terrence Pratt in his February 4, 2008, report should be construed as a 10 percent impairment to the left upper extremity at the level of the forearm as measured by the AMA *Guides*.[1] In addition, the parties made two more stipulations at oral argument; namely, that June 25, 2006, was the last day claimant worked for respondent and that May 7, 2007, was the day claimant commenced working for another employer.

ISSUES

This is a claim for a November 5, 2005, left upper extremity injury. In the November 25, 2008, Award, Judge Howard granted claimant permanent disability benefits

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

under K.S.A. 44-510d for a 10 percent impairment of the left upper extremity at the level of the forearm. The Judge also granted claimant temporary total disability benefits from the date of accident until May 31, 2006, when claimant was released to return to work at full duty by his treating physician Dr. Michael M. Hall. The Judge, however, denied claimant's request for temporary total disability benefits after May 31, 2006. When computing claimant's permanent disability benefits, the Judge deducted the temporary total disability benefits that claimant had been paid. What is more, the Judge concluded respondent had overpaid disability compensation to claimant.

Claimant contends Judge Howard erred. Claimant argues: (1) he has proven he should receive temporary total disability benefits during the periods from June 25, 2006, until November 11, 2006, and from November 11, 2006, until May 7, 2007; (2) neither temporary total nor temporary partial disability benefits should be considered or deducted in the computation for determining the permanent disability benefits due for a scheduled injury; (3) Dr. Gary L. Baker's December 20, 2006, report to Judge Howard should be included as part of the record; and (4) the testimony from Dr. Hall should be excluded from the record because the doctor charged respondent a fee greater than that allowed by the Division of Workers Compensation's fee schedule.

Conversely, respondent contends: (1) the Judge correctly determined claimant was not temporarily and totally disabled after May 31, 2006; (2) claimant's functional impairment is three percent to the left hand; (3) the Judge did not err in subtracting temporary total disability benefits when determining claimant's award of permanent partial disability benefits; (4) Dr. Baker's December 20, 2006, report to Judge Howard is not part of the record as the Judge did not request the doctor to perform an independent medical evaluation and report back to the Judge; and (5) claimant's objection to Dr. Hall's testimony on the basis of the fee charged to respondent is groundless.

The issues before the Board on this appeal are:

1. What is the extent of claimant's functional impairment?

2. Is claimant entitled to receive temporary total disability benefits for any period after May 31, 2006?

3. Should temporary total disability benefits be deducted in the formula used to determine an award of permanent partial disability benefits for a scheduled injury?

4. Is Dr. Baker's December 20, 2006, medical report part of the record?

5. Should Dr. Hall's testimony be excluded for the reason the doctor allegedly charged respondent a fee greater than that allowed by the fee schedule?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

There is no dispute that on November 5, 2005, claimant injured his left upper extremity when he slipped and landed on his left hand while wrapping a loaded pallet with plastic wrap. There is also no dispute claimant's accident arose out of and in the course of his employment with respondent.

Following the accident claimant began receiving medical treatment for his injury and he was taken off work. Eventually, in March 2006, claimant began treating with Dr. Michael M. Hall, an orthopedic surgeon. The doctor found inflammation in claimant's left index finger and his left small finger, inflammation in the de Quervain's compartment in his left wrist, and possible carpal tunnel syndrome. In late April 2006 the doctor performed trigger finger releases on the two fingers. The doctor prescribed therapy and by the end of May 2006 claimant was able to lift up to 100 pounds and told the doctor he was doing great. Consequently, on May 31, 2006, the doctor released claimant to return to work without any restrictions or limitations.

Respondent voluntarily paid claimant temporary total disability benefits from November 6, 2005,[2] through May 31, 2006, when claimant was released from medical care by Dr. Hall.

Upon returning to work for respondent claimant experienced difficulties with his left upper extremity and performing his job. Claimant worked through June 25, 2006, when he stopped working due to his ongoing symptoms. Moreover, he requested respondent to provide him additional medical treatment.

Claimant, at his attorney's request, was evaluated by Dr. Pedro A. Murati. The doctor examined claimant on July 5, 2006, only days following claimant's last day of work for respondent. Dr. Murati believed claimant had left carpal tunnel syndrome; therefore, he recommended nerve tests and such other treatment as may be indicated by the test results. The doctor also recommended temporary restrictions; namely, no climbing ladders; only occasionally using repetitive hand controls on the left; no repetitive grasping/grabbing and no heavy grasping, all on the left; no using hooks or knives on the left; no using vibratory tools on the left; using a wrist splint on the left while working and at

[2] R.H. Trans., Resp. Ex. A (at line 3 of page 8 of 9).

home; and limiting keyboarding to 10 minutes on and 50 minutes off. The doctor later testified those temporary restrictions would not have prevented claimant from working.[3]

Following a preliminary hearing, on October 31, 2006, Judge Howard entered an order that authorized Dr. Gary L. Baker to treat claimant. Furthermore, the Judge took claimant's request for temporary total disability benefits under advisement.

Dr. Baker did not testify. Claimant, however, testified that the doctor prescribed medications and therapy and did not let him work.[4] But claimant also testified he did not return to work for respondent after seeing Dr. Baker because "they weren't treating [him] the way they should have been treating [him]."[5] He further explained that his job was physically demanding and that respondent expected him to work as if he had fully recovered from his injuries or, in other words, as if he were at 100 percent.[6]

When Dr. Baker released claimant on May 7, 2007, claimant commenced working for another employer operating a machine. According to claimant the machine bores holes in the ground for laying telephone cable. Claimant's new job is much less demanding than his former job with respondent as he now mostly pushes buttons.

The record includes only two opinions regarding the extent of claimant's functional impairment. Dr. Hall rated claimant as having a 10 percent impairment to each finger he performed surgery on, which yielded a three percent impairment to the left hand as measured by the *Guides*. Dr. Terrence Pratt, who examined and evaluated claimant at the Judge's request for purposes of providing a functional impairment rating, determined claimant sustained a 10 percent impairment to the left upper extremity at the level of the forearm under the *Guides*. Dr. Murati did not rate claimant's impairment and Dr. Baker did not testify.

The Judge adopted the rating from the independent medical examiner, Dr. Pratt, and concluded claimant sustained a 10 percent impairment to the left upper extremity at the level of the forearm. The Board affirms that finding. Dr. Pratt's February 4, 2008, medical report indicates the doctor conducted a thorough examination and evaluation, which was the most recent. In addition to the metacarpal fracture and trigger fingers that claimant initially experienced, Dr. Pratt also found that claimant has mild findings of a

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[3] Murati Depo. at 27.

[4] R.H. Trans. at 9.

[5] *Id.*

[6] *Id.* at 10, 11.

complex regional pain syndrome. The Board finds Dr. Pratt's analysis and rating are justified and persuasive. The Board affirms the Judge's finding that claimant has sustained a 10 percent impairment to his left upper extremity at the level of the forearm.

CONCLUSIONS OF LAW

Dr. Gary L. Baker's December 20, 2006, report

In the November 25, 2008, Award, Judge Howard listed Dr. Baker's December 20, 2006, report as part of the record. Respondent contends the Judge erred in considering that report. Claimant, on the other hand, contends the report should be included as part of the record.

As indicated above, Judge Howard authorized Dr. Baker to treat claimant. The doctor then examined claimant on November 13, 2006, and for some unknown reason wrote Judge Howard on December 20, 2006. That report included, among other things, the doctor's treatment plan and the doctor's opinions regarding claimant's work status at that time.

Dr. Baker did not testify. Before Judge Howard issued the November 25, 2008, Award, there is no indication in the record that the Judge had advised the parties he intended to consider Dr. Baker's report. And the parties never stipulated or agreed that Dr. Baker's report would be included as part of the record.

The Workers Compensation Act generally prohibits medical reports from the evidentiary record unless the author of the medical report testifies. K.S.A. 44-519 provides:

> Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, **no report of any examination** of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, **shall be competent evidence** in any proceeding for the determining or collection of compensation **unless supported by the testimony of such health care provider**, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible. (Emphasis added.)

Nonetheless, the Workers Compensation Act provides that an administrative law judge may refer a worker to an independent health care provider for an opinion regarding

functional impairment[7] or for other opinions.[8] And when the judge requests such an independent evaluation and opinion, those opinions become part of the evidentiary record without the necessity of the author testifying.

Judge Howard authorized Dr. Baker to treat claimant. The Judge did not refer claimant to the doctor for an independent medical evaluation and medical report. In short, claimant has failed to establish that Dr. Baker's report was generated at the Judge's request under either K.S.A. 44-510e or 44-516. Accordingly, the rule of K.S.A. 44-519 is applicable and Dr. Baker's December 20, 2006, medical report is not admissible as the doctor did not testify in this claim.

The testimony of Dr. Michael M. Hall

Respondent took Dr. Hall's deposition. Towards the end of the deposition the doctor testified he was charging $1,000 per hour for his testimony. And although he did not lodge that objection at the deposition, claimant now argues the doctor's testimony should be excluded from the record as the doctor allegedly exceeded the charges allowed under the Division of Workers Compensation fee schedule.[9]

Claimant has cited no statutory authority or case law that supports his argument. The Act allows a civil penalty for overcharging for services but does not provide an exclusionary rule as suggested by claimant.[10] The Board finds claimant's objection to Dr. Hall's testimony should be overruled.

Temporary total disability benefits

As indicated above, respondent voluntarily paid temporary total disability benefits from November 6, 2005, through May 31, 2006. There is no dispute that claimant is entitled to receive temporary total disability benefits for that period. But respondent does dispute that claimant is entitled to receive temporary total disability benefits for any period following May 31, 2006. And respondent specifically raised that issue at the regular hearing.

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[7] See K.S.A. 44-510e(a).

[8] See K.S.A. 44-516.

[9] See K.S.A. 44-510i(e) and 44-510j(h).

[10] K.S.A. 44-510j(g).

Temporary total disability exists when a worker is completely and temporarily incapable of engaging in any substantial and gainful employment.[11] Accordingly, claimant has the burden to prove that he was unable to work at any substantial and gainful employment after May 31, 2006.

And claimant has failed to prove that he was unable to work after May 31, 2006.

Dr. Murati, who examined claimant at claimant's attorney's request on July 5, 2006, testified claimant was not at maximum medical improvement on that date. Moreover, the doctor recommended temporary work restrictions. Nonetheless, those restrictions would not have prevented claimant from working or engaging in substantial and gainful employment. Dr. Murati testified, in part:

> Q. (Mr. Gaarder) That note [Dr. Hall's May 31, 2006, work release] released Mr. Rios to return to work noting that he was able to lift 100 pounds the other day during therapy and was released to full duty. You are not aware of that at the time of your [July 5, 2006] report, is that correct?
>
> A. (Dr. Murati) Correct.
>
> Q. The only restrictions you were aware of were the ones issued by Dr. Hall directly after Mr. Rios' surgery?
>
> A. Correct.
>
> **Q. By no means do your work restrictions completely restrict Mr. Rios out of employment?**
>
> **A. No, no, not at all.**[12]

Claimant has presented no expert medical opinion that he was incapable of engaging in any substantial or gainful employment after May 31, 2006. And claimant's testimony fails to establish it is more probably true than not that claimant was incapable of engaging in substantial and gainful employment during the period in question. Conversely, Dr. Hall had released claimant to return to regular work and Dr. Murati had recommended temporary restrictions, which Dr. Murati states did not prevent claimant from working. What is more, the evidence fails to establish that claimant's condition following May 31, 2006, was substantially different than it is now.

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[11] K.S.A. 44-510c(b)(2).

[12] Murati Depo. at 27 (emphasis added).

The Board finds claimant has failed to prove he was unable to engage in substantial and gainful employment after May 31, 2006. Consequently, the Board affirms the denial of temporary total disability benefits after that date.

How should temporary total disability benefits be treated when calculating permanent disability benefits for a scheduled injury?

Claimant's injury is listed in the schedule of K.S.A. 44-510d; consequently, that statute controls the computation of claimant's permanent disability benefits. When determining the number of weeks of permanent disability benefits claimant was entitled to receive, the Judge deducted the number of weeks of temporary total disability benefits that claimant was entitled to receive from the maximum weeks of benefits that a worker could receive for an injury to the forearm, or 200 weeks. Claimant contends the Judge erred as the weeks of temporary total disability benefits should not be considered when making that calculation.

The schedule of K.S.A. 44-510d provides that a worker is entitled to no more than 200 weeks of permanent disability benefits for the loss of a forearm. But that statute does not address how temporary total disability benefits figure into the computation. Indeed, the Act is silent. Consequently, K.A.R. 51-7-8 was adopted and it provides:

> (a)(1) If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries.
>
> (2) The weekly compensation rate for temporary total compensation shall be computed by multiplying .6667 times the worker's gross average weekly wage. This figure shall be subject to the statutory maximum set in K.S.A. 44-510c.
>
> (b) If a healing period of 10% of the schedule or partial schedule is granted, not exceeding 15 weeks, it shall be added to the weeks on the schedule or partial schedule before the following computations are made.
>
> (1) If a loss of use occurs to a scheduled member of the body, compensation shall be computed as follows:
>
> (A) deduct the number of weeks of temporary total compensation from the schedule;
>
> (B) multiply the difference by the percent of loss or use to the member; and
>
> (C) multiply the result by the applicable weekly temporary total compensation rate.
>
> (2) If part of a finger, thumb, or toe is amputated, compensation shall be calculated as follows:
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> (A) multiply the percent of loss, as governed by K.S.A. 1996 Supp. 44-510d, as amended, by the number of weeks on the full schedule for that member;
>
> (B) deduct the temporary total compensation; and

> (C) multiply the remainder by the weekly temporary total compensation rate.
>
> (3) If a scheduled member other than a part of a finger, thumb, or toe is amputated, compensation shall be computed by multiplying the number of weeks on the schedule by the worker's weekly temporary total compensation rate. The temporary total compensation previously paid shall be deducted from the total amount allowed for the member.
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> (c)(1) An injury involving the metacarpals shall be considered an injury to the hand. An injury involving the metatarsals shall be considered an injury to the foot.
>
> (2) If the injury results in loss of use of one or more fingers and also a loss of use of the hand, the compensation payable for the injury shall be on the schedule for the hand. Any percentage of permanent partial loss of use of the hand shall be at least sufficient to equal the compensation payable for the injuries to the finger or fingers alone.
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> (3) An injury involving the hip joint shall be computed on the basis of a disability to the body as a whole.
>
> (4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.
>
> (5) If the tip of a finger, thumb, or toe is amputated, the amputation does not go through the bone, and it is determined that a disability exists, the disability rating shall be based on a computation of a partial loss of use of the entire finger. (Authorized by K.S.A. 1996 Supp. 44-510d and K.S.A. 44-573; implementing K.S.A. 1996 Supp. 44-510d; effective Jan. 1, 1966; amended Jan. 1, 1971; amended Jan. 1, 1973; amended, E-74-31, July 1, 1974; amended May 1, 1975; amended Feb. 15, 1977; amended May 1, 1978; amended May 1, 1983; amended, T-88-20, July 1, 1987; amended May 1, 1988; amended May 22, 1998.)

In short, the regulation indicates that the weeks of temporary total disability benefits are to be deducted from the maximum number of weeks provided in the schedule before multiplying by the functional impairment rating to obtain the number of weeks of permanent disability benefits due the injured worker.

There is no question the Director of Workers Compensation may adopt the rules and regulations that are necessary for administering the Workers Compensation Act. The Act provides:

> The director of workers compensation may adopt and promulgate such rules and regulations as the director deems necessary for the purposes of administering and enforcing the provisions of the workers compensation act. . . . All such rules and regulations shall be filed in the office of the secretary of state as provided by article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.[13]

[13] K.S.A. 44-573.

And administrative regulations that are adopted pursuant to statutory authority for the purpose of carrying out the declared legislative policy have the force and effect of law.[14]

> "Rules or regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency. Those rules or regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency have been found void. Administrative rules and regulations to be valid must be appropriate, reasonable and not inconsistent with the law." *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, Syl. ¶ 1, 673 P.2d 1126 (1983).[15]

Administrative agencies are generally required to follow their own regulations and failure to do so results in an unlawful action.[16]

Consequently, claimant's award of permanent partial disability benefits must be computed after reducing the maximum 200 weeks by the temporary total disability weeks.[17]

In conclusion, the Board modifies the November 25, 2008, Award to exclude the December 20, 2006, report of Dr. Baker but otherwise affirms the Award.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[18] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the November 25, 2008, Award entered by Judge Howard to exclude the December 20, 2006, report of Dr. Baker but otherwise affirms the Award.

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[14] See K.S.A. 77-425; *Harder v. Kansas Comm'n on Civil Rights*, 225 Kan. 556, Syl. ¶ 1, 592 P.2d 456 (1979); *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 1, 763 P.2d 317 (1988).

[15] *State v. Pierce*, 246 Kan. 183, 189, 787 P.2d 1189 (1990).

[16] *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 2, 763 P.2d 317 (1988).

[17] See also *Cowan v. Josten's American Yearbook Co.,* 8 Kan. App. 2d 423, 427, 660 P.2d 78, *rev. denied* 233 Kan. 1091 (1983); *Rhea v. Kansas City Power & Light Co.*, 176 Kan. 674, 678, 272 P.2d 741 (1954).

[18] K.S.A. 2008 Supp. 44-555c(k).

The Board notes that the Judge did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Accordingly, under K.S.A. 44-536(b), claimant is entitled to such fee as approved.

IT IS SO ORDERED.

Dated this ____ day of April, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent
Steven J. Howard, Administrative Law Judge